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Nana G. Penrose, Plaintiff/Appellant, v. Christopher Ross, An Individual, Bryant Ross, An Individual (Formerly identified as DOE 1), DOES 2-5 Inclusive, Whose True Names Are Not Known to Plaintiff, Defendants/Appellees : Reply Brief

Utah Court of Appeals

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Nana G. Penrose, :
Plaintiff / Appellant, : Appellate Case No. 20010943 CA
v. :
Priority Classification No. 15
:
Christopher Ross, An Individual,
Bryant Ross, An Individual (Formerly :
identified as DOE 1), DOES 2-5
Inclusive, Whose True Names Are :
Not Known to Plaintiff,
Defendants/Appellees. :

APPEAL FROM THE THIRD DISTRICT COURT IN AND FOR SALT LAKE
COUNTY, STATE OF UTAH

Appeal from the Order Granting Defendant Bryant Ross' Motion for Summary Judgment of the THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, Salt Lake Department, the Honorable Judge Leon A. Dever presiding.

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IN THE UTAH COURT OF APPEALS

Nana G. Penrose, Plaintiff / Appellant,	:	Appellate Case No. 20010943 CA
	:	
v.	:	Priority Classification No. 15
	:	
Christopher Ross, An Individual, Bryant Ross, An Individual (Formerly identified as DOE 1), DOES 2-5 Inclusive, Whose True Names Are Not Known to Plaintiff, Defendants/Appellees.	:	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE THIRD DISTRICT COURT IN AND FOR SALT LAKE
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STATUTORY PROVISIONS

URCP Rule 15(c)	1,2,6,8,11
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PRIOR OR RELATED APPEALS

There have been no prior or related appeals.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Annotated Section 78-2a-3(2)(j). This is an appeal from an Order Granting Defendant's Motion for Summary Judgment.

ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

1. Utah Rules of Civil Procedure, Rule 15 (Amended and Supplemental pleadings)

sets forth in Subsection (c) that

“Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.”

Normally, however, the rule does not apply to a party added by later amendment. An exceptions exists under Utah Case Law which does cause a relation back in the case of a party added by amendment where an “identity of interest” exists between the original defendant and the added party.

“Identity of interest” is defined in the case law as meaning that notice to the original defendant serves as notice to the added party so it can be assumed that relation back is not prejudicial, and that the real party in interest was sufficiently alerted to the proceedings, or was involved in them unofficially

from an early stage.

Does plaintiff/appellant's First Amended Complaint naming Bryant Ross as a defendant relate back in time to the date of the filing of the original complaint under the "identity of interest" exception recognized under Utah Law ?

On review of a summary judgment motion, the party against whom the judgment has been granted is entitled to have all the facts presented , and all the inferences fairly arising therefrom , considered in a light most favorable to him. *Morris v. Farnsworth Motel*, 123 Utah 289, 259 P.2d 297 (1953), *Mountain States Tel. & Tel. Co. v. Garfield County*, 811 P.2d 184 (Utah 1991).

The appellate court reviews the trial court's conclusions of law for correctness, including its conclusion that there are no material fact issues.

Springville Citizens for a Better Community v. City of Springville, 979 P.2d 332 (Utah 1999), *Neiderhauser Bldrs.& Dev. Corp. v. Campbell*, 824 P.2d 1193 (Utah Ct. App. 1992).

CONTROLLING STATUTES

1. URCP Rule 15(c) - Regarding Amended and Supplemental Proceedings. *Relation back of amendments*. Whenever the claim or defense asserted in the amended

pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

STATEMENT OF THE CASE

Nature of the case - This is an appeal from an Order Granting Defendant's Motion for Summary Judgment.

Course of Proceedings (Addenda referred to attached to Opening Brief):

1. This case arises out of an automobile accident involving plaintiff which occurred in Salt Lake City, Utah on November 26, 1996. (Verified Complaint, attached as Addendum A).
2. On the date plaintiff filed her original Verified Complaint herein (hereinafter "original complaint"), November 17, 2001, plaintiff did not know the name of the individual Bryant Ross. (Original Complaint, attached as Addendum A; Affidavit of Nana G. Penrose in Support of Opposition to Motion for Summary Judgment, hereinafter "plaintiff's affidavit", attached as Addendum C). In addition to Christopher Ross, plaintiff sued persons whose true identities were unknown to her under the fictitious names of DOES 1-5, and stated that those persons, along with Christopher Ross were negligently responsible for her injuries and damages. This was done in accordance with Utah Rules of Civil Procedure, Rule 9

(a)(2). (Original Complaint; Addendum A).

3. Plaintiff had never received a copy of the Police Report regarding the accident until defendant's counsel provided it to plaintiff's counsel in January, 2001. (Affidavit of Nana G. Penrose in Support of Opposition to Motion for Summary Judgment, hereinafter "plaintiff's affidavit", Addendum C). Because plaintiff did not know Bryant Ross' name, attempts to obtain a copy of the accident report from the police department by plaintiff's counsel were unsuccessful. (Plaintiff's Affidavit; Addendum C).
4. Plaintiff gave a recorded statement regarding the accident in April, 1997, but never received a copy of that statement. (Plaintiff's Affidavit; Addendum C) Although the person taking the statement apparently mentioned the name Bryant Ross during that interview, his name was mentioned only once in passing along with other information about the accident, and plaintiff did not remember it some three and one half years later when she signed her original complaint. (Plaintiff's Complaint, attached as Addendum A; Plaintiff's Affidavit; Addendum C)
5. The only name plaintiff knew of regarding the accident at the time she signed her original complaint was Christopher Ross, whose name she knew because it was set forth in a 1997 letter from an insurance company, in which Christopher Ross was the only person listed as "our insured".

(Plaintiff's Affidavit, exhibit A thereto; Addendum C) .

6. Following service of plaintiff's original complaint upon Christopher Ross, on December 18, 2000, plaintiff's counsel received a recorded telephone message from defendant Christopher Ross saying that it was his son Bryant Ross who was involved in the accident. On January 2, 2001, plaintiff filed her First Amended Verified Complaint which was amended to add the name of Bryant Ross in place of fictitious name DOE 1. (Plaintiff's First Amended Verified Complaint, hereinafter Amended Complaint, attached hereto as Addendum D).
7. Defendants Bryant Ross and Christopher Ross were both served with the Amended Complaint at the Ross' home on January 8, 2001. (Return of Service, attached hereto as Addendum E) On January 22, 2001, Defendants Ross filed their Answer to the Amended Complaint.
8. The parties thereafter made their Initial Disclosures and the Stipulated Discovery Plan and upon which an Order was been signed and entered.
9. On May 9, 2001, Defendant Bryant Ross filed his Motion for Summary Judgment arguing that the statute of limitations had expired prior to the filing of Plaintiff's Amended Complaint which amended the original complaint to name Bryant Ross as the negligent driver who struck plaintiff and injured her and totalled her vehicle. (See Addendum F).

10. On May 18, 2001 Plaintiff filed her Memorandum of Points and Authorities in Opposition to Defendant Bryant Ross' Motion for Summary Judgment and Request for Hearing . (See Addendums G & H).
11. On June 16, 2001, Plaintiff filed her Memorandum of Points and Authorities in Response to Defendant Bryant Ross' Reply Memorandum in Support of Motion for Summary Judgment. (See Addendum I).
12. On September 6, 2001 the Trial Court made and entered its Minute Entry / Disposition Summary granting Defendant Bryant Ross' Motion for Summary Judgment. (See Addendum J).
13. On October 1, 2001, Plaintiff filed her Objection to Proposed Order Granting Defendant Bryant Ross' Motion for Summary Judgment. (See Addendum K).
14. On October 1, 2001, the Trial Court signed and entered the Order Granting Defendant Bryant Ross' Motion for Summary Judgment. (See Addendum L).

SUMMARY OF THE ARGUMENT

While generally URCP, Rule 15(c) will not apply to an amendment which substitutes or adds new parties for those brought before the court by the original pleadings, the Utah Supreme Court has made an exception to the general rule. The exception operates where there is a relation back, as to both plaintiff and defendant, when new and old parties have an identity of interest; so that notice to one serves to give notice

to the other and it can be assumed or proved that relation back is not prejudicial.

In this case, the party named as the defendant in Plaintiff's original Complaint, Christopher Ross, is the father of Bryant Ross, who was named as a defendant in Plaintiff's Amended Complaint which filed some six weeks after the original Complaint was filed. At the time that the automobile accident which gave rise to this case occurred, Bryant Ross was under 21 years of age and living at his father's home. Bryant Ross was insured under Christopher Ross' Insurance policy. Immediately following the accident, young Bryant Ross was hospitalized, as was Plaintiff (who suffered a broken bone). When Christopher Ross was later served with the original summons and complaint, he was at his home. That was the same home where both he and Bryant were served with the Amended Complaint shortly thereafter. It appears that Bryant Ross still was living at his father's home. Therefore, it would defy common sense to conclude that upon being served with the original Complaint regarding the accident that Bryant had caused, that Christopher Ross would not inform his son of this. After all, Christopher would have known that he had not caused that accident and would certainly remember his son being involved in an accident and having been hospitalized. Bryant Ross got notice of the proceedings following the service of the original Complaint on his father at their home. Additionally, because Plaintiff's Amended Complaint was filed and served only approximately six weeks after the original, there was no risk of prejudice to Bryant Ross by allowing the amendment to "relate back" to the filing date of the original Complaint. Moreover,

because both Christopher and Bryant were insured by the same company, with the same adjusters, investigators and attorneys, the information that those persons began gathering following the accident, and later service of the original Complaint upon Christopher Ross was available for use in defending either or both of the Ross's. Therefore, no prejudice can have resulted by virtue of the amendment "relating back" to the filing date of the original Complaint.

REPLY ARGUMENT

Introduction

During the pendency of the present appeal this Court has made its decision in the case of Nunez v Albo, 2002 Utah App. 247 (Utah App. 2002) which dealt with issues regarding Utah Rule of Civil Procedure, Rule 15 (a) amendment of pleadings, and (c) relation back of amendments. In that case, this Court held that the trial court had abused its discretion in denying a motion to amend the plaintiff's Complaint to add another party as a defendant after the statute of limitations had expired where the claim in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading, and the new defendant sought to be added had an "identity of interest" with the original party named in the complaint "so it can be assumed or proved the relation back is not prejudicial". This Court's holding in the Nunez case applied set principles that have been consistently enunciated by Utah Courts.

There can be no argument that the claim set forth in the Amended Complaint did

not arise out of the same automobile accident as that set forth in the original complaint.

Point I

THE TERM “IDENTITY OF INTEREST” IS NOT ONE WHICH DESCRIBES A COMMON LEGAL INTEREST OR POSITION, BUT RATHER IS ONE WHICH DESCRIBES A SITUATION IN WHICH THE REAL PARTIES IN INTEREST HAVE BEEN SUFFICIENTLY ALERTED TO THE PROCEEDINGS OR HAVE BEEN INVOLVED IN THEM UNOFFICIALLY FROM AN EARLY STAGE SUCH THAT IT CAN BE ASSUMED OR PROVED THAT THE RELATION BACK IS NOT PREJUDICIAL

Appellee argues that the term “identity of interest” means a common legal interest or position. Yet appellee has not been able to point to any case which says that for the reason that no Utah case has made that statement. On the other hand, a long line of cases, which now includes the Nunez case, have clearly stated what “identity of interest” means: “An identity of interest exists when ‘the real parties in interest were sufficiently alerted to the proceedings, or were involved in them unofficially, from an early stage.’” Nunez v. Albo, 2002 UT App 247, para. 29 (Utah App. 2002) (quoting Sulzen v. Williams, 1999 UT App 76, para. 14, 977 P.2d 497 (in turn, quoting Doxey Layton Co. v. Clark, 548 P.2d 902, 906 (Utah 1976))). Once a party is “sufficiently alerted to proceedings, or involved in them unofficially, from an early stage”, the party is put on notice of the proceedings “so it can be assumed or proved that the relation back is not prejudicial”. Wilcox v. Geneva Rock Corp., 911 P.2d. 367, 369 (Utah 1996). The point of these holding is that notice or unofficial involvement prevents a relation back from causing prejudice to the party added by the amendment.

The criteria used in the decisions made in the above-cited cases is set forth clearly. Moreover, the argument that “identity of interest” means a common legal interest really does not make sense because it could lead to a circumstance where a party who did have a common legal interest or position (e.g. joint and several liability) with a party already involved in a lawsuit did not receive notice and was prejudiced by the passage of time, yet could be later added as a defendant.

Appellee cites the case of Russell v. Standard Corporation, 898 P2d. 263 (Utah 1995) for the proposition that relationships do not satisfy the identity test. First, plaintiff has not suggested that relationships alone would satisfy the test. Rather, for the reasons set forth in Appellant’s Opening Brief, plaintiff has said that all of the facts of this case lead to an inescapable conclusion that Bryant Ross got notice of the lawsuit, and/or was unofficially involved, from an early stage. Second, the Court specifically stated in Russell that “notice” **was** the key inquiry in determining whether parties had an identity of interest, and went on to point out that the appellant “Russell does not assert that her original complaint served to provide notice of the action to Standard” Russell at p. 265. That case simply seems to support Appellant’s position and is consistent with the other cited cases.

Point II

APPELLEE HAS NEVER EVEN ARGUED THAT HE DID NOT RECEIVE NOTICE OF THE PROCEEDINGS OR THAT HE WOULD HAVE BEEN PREJUDICED BY THE RELATION BACK OF THE AMENDMENT

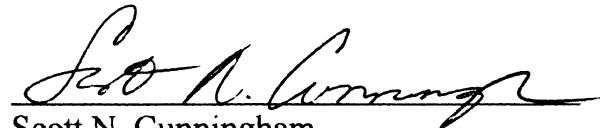
Appellee would like to try to change the definition of “identity of interest” for the reason that an application of the actual definition of that term to the facts of this case would lead to a finding of an identity of interest and the conclusion that the trial court erred in granting the motion for summary judgment despite the filing of the Amended Complaint. In fact, it is most noteworthy and probative that Appellee has never argued that he was not sufficiently alerted to the proceedings, or was not unofficially involved in them, from an early stage. Additionally, no prejudice can have resulted to Appellee with the filing and service of the Amended Complaint some six weeks after the original complaint was filed and prior to any formal discovery having been conducted.

CONCLUSION

Plaintiff had submitted sufficient evidence to establish that Christopher Ross and Bryant Ross had an “Identity of Interest” such as has been recognized in the Utah cases cited above as an exception to the “Relation Back” rule of URCP, Rule 15(c). Therefore, Plaintiff’s Amended Complaint should have been held to have “related back” to the date that the original Complaint was filed, prior to the expiration of the statute of limitations.

Certainly, no prejudice could have resulted to Bryant Ross by allowing such an amendment. Lastly, Plaintiff should have her day in Court against the responsible party who caused the accident which permanently injured her and which has left her with unpaid medical bills in the thousands of dollars.

DATED this 28th day of August, 2002

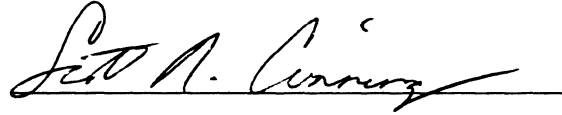

Scott N. Cunningham
Attorney for the Appellant

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2002, I personally delivered two true and correct copies of the foregoing **Reply Brief of Appellant** to the following:

Attorney for Defendant/ Appellee:

Michael W. Wright
2180 South 1300 East, Suite 600
Salt Lake City, Utah 84106

A handwritten signature in black ink, appearing to read "Scott A. Cunningham", written over a horizontal line.

Case No. 20010943-CA
District Court Case No. 000909391